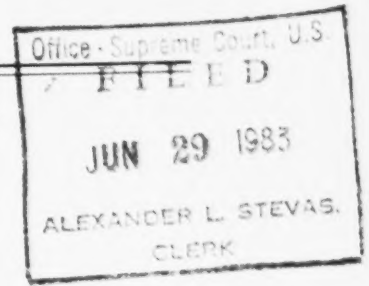

NO. 82-1814



in the
Supreme Court
of the
United States

October Term, 1982

CITY OF FORT LAUDERDALE, FLORIDA,
Petitioner,

vs.

ARTHUR FARMER,
Respondent.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRUCE H. LITTLE, ESQ.
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Counsel for Respondent

QUESTION PRESENTED

Whether it is constitutionally permissible to dismiss a police officer from his employment for refusing to obey the order of a superior officer to submit to a polygraph examination in connection with an ongoing criminal investigation.

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 427 So. 2nd 187; the text of which is contained in the Appendix to Petitioner's petition.

JURISDICTION

As stated by Petitioner, the judgment of the Supreme Court of Florida was entered on February 10, 1983, but no rehearing was requested. Petitioner erroneously bases its jurisdiction on 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS

The Florida Supreme Court did not apply any constitutional provisions in deciding the case, although the Fifth and Fourteenth Amendments to the Constitution of the United States were referred to in the briefs and opinion.

STATEMENT OF THE CASE

Respondent would agree with Petitioner's statement except for a few points. While working at the bank, Respondent was off-duty. When Respondent was directed to take the polygraph test, it was more than a year after the incident, Respondent did not refuse to take the test, his response was, "not at this time."

Upon affirmance by the District Court of Appeal for the Fourth District of Florida, the Court certified three questions to the Supreme Court of the State of Florida, as being of great public importance. Those questions were;

1) Does Section 914.04 of the Florida Statutes and the Supreme Court's decision in Lurie v. Florida State Board of Dentistry prohibit the use of immunized testimony to discharge a city employee?

2) Should a city employee's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida require protection by immunization from all penal sanctions as opposed to only criminal?

3) Can a police officer be compelled to submit to a polygraph test when he is a suspect in a criminal investigation without granting him immunity from all penalties or forfeitures?

The Supreme Court of the State of Florida refused to answer these questions.

ARGUMENT

1. The Court below decided the case without use of prior decisions of this Court, and therefore could not have misapplied or improperly extended prior decisions of this Court.

Petitioner has improperly attempted to gain jurisdiction of this Court pursuant to 28 USC 1254 (1). That statute applies to review of United States Court of Appeal cases. Jurisdiction may be founded upon 28 USC 1257, but it does not deny the necessity of a federal question being involved. That consideration alone, governs whether this Court has jurisdiction.

It should be remembered that the allegation was that Respondent refused to take a polygraph test. He did not refuse to give a statement.

Therefore, the Florida Supreme Court in deciding the case, reached its decision on purely state grounds. Although the questions certified to the Florida Supreme Court were of a constitutional magnitude, the Court refused to answer them as being "irrelevant" (Petitioner's Appendix pg. 12). The case was decided on the basis of the unreliability of the polygraph;

For reasons hereinafter discussed, we hold that the same unreliability which prevents the polygraph's admissibility in court should preclude the dismissal of a police officer for failure to take a test.

(Petitioner's Appendix pg. 7)

The Supreme Court of the United States should not review a state court judgment based upon an ade-

quate and independent non-federal or state ground, even though a federal is involved. Fox Film Corp. v. Muller, 296 U.S. 207 (1935). There are two major questions to be decided in determining jurisdiction;

1) is the state court judgment based upon a nonfederal ground?; if so,

2) is that nonfederal ground adequate to support the state court judgment?

If both are answered "yes," then jurisdiction fails. Where the federal questions are discussed only in certain "broad statements" in the state court's opinion, statements which on analysis are not necessary to the court's judgment on state grounds, the Supreme Court of the United States, should decline jurisdiction. Black v. Cutler Laboratories, 351 U.S. 292 (1956). Jurisdiction is not demonstrated by the mere citation of

Supreme Court decisions in the opinion. Osborne v. Clark, 204 U.S. 565 (1907). The law is clear; once a case reaches the United States Supreme Court, review is limited to the specific federal question(s) that were properly raised in the state court, and that were expressly or necessarily decided. Whitney v. California, 274 U.S. 357 (1927).

The Supreme Court of the State of Florida did not decide the case sub judice on any federal issue. It was decided on the unreliability of the polygraph. The Court was not required to decide the federal issues presented, which it chose not to do. The thrust of its decision was that an order to take a polygraph examination, was not a lawful or reasonable order. There has most certainly been no certificate from the Florida Supreme Court as to existence of a federal question. Petitioner attempts to create

a federal question. Noting; "Thus, the decision of the court below constitutes a clear departure from the line (spl.) of decisions of this Court holding that public employees do not have a constitutional right to refuse to account for their official actions and still keep their jobs. 27" (Petitioner's Brief, pg.13). Respondent never refused to account for his official actions. He gave a statement. It was only when ordered to take a polygraph test, he replied, "not at this time." He had already accounted for actions, as required by prior decisions of this Court.

Based upon the lack of a federal question, certiorari should be denied for lack of jurisdiction.

2. The Court below never decided a federal question so as to conflict with decisions of other state courts.

Although the decision below is contrary to some state courts which have addressed this issue, it is not contrary to all. Each may be distinguished on its own merits. Petitioner fails to cite any basis for the United States Supreme Court to resolve conflicts between state court decisions. Even if there was such a basis, Petitioner is still lacking a federal question. It is not the position of the United States Supreme Court to give advisory opinions, or oversee the State Courts.

CONCLUSION

For lack of jurisdiction, and those other reasons stated, the Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

BRUCE H. LITTLE, ESQ.

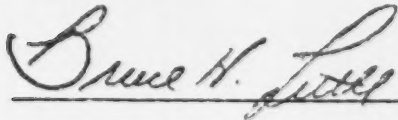
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Response to Petition for a Writ of Certiorari has been furnished by U.S. Mail to: United States Supreme Court, Washington, D.C., and to: DONALD R. HALL, City Attorney, P.O. Box 14250, Fort Lauderdale, Florida, 33302, and to: ARTHUR FARMER, 5400 S.W. 6th Place, Margate, Florida, this 23rd day of June, 1983.

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By Bruce H. Little /KR
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